COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 025270-99**

Denise A. Smith	Employee
Alan Ritchey, Inc.	Employer
Ace Property & Casualty Ins.	Insurer

REVIEWING BOARD DECISION

(Judges Levine, Carroll and McCarthy)

APPEARANCES

Anthony P. Facchini, Esq., for the employee at hearing
Anthony P. Facchini, Esq., and Michael D. Facchini, Esq., for the employee on brief
William R. Maher, Esq., for the insurer at hearing and on brief

LEVINE, J. The insurer appeals the decision of an administrative judge awarding the employee § 34 temporary total incapacity benefits, medical benefits and counsel fees. The insurer contends that the opinion of the § 11A impartial physician falls short of establishing a causal connection between the employee's medical disability and her work. Because the physician, in the end, failed to express an opinion on causal relationship and because the judge felt there was merit to the employee's claim, we recommit the case for additional medical evidence.

The insurer opposed the employee's initial claim for workers' compensation benefits. After a § 10A conference, the judge issued an order awarding the employee ongoing § 34 benefits. The insurer appealed to a de novo hearing. (Dec. 1.)

At the time of the hearing, Denise Smith was a forty-eight year old woman with an eleventh grade education. For most of her life she stayed at home raising three children. From 1996 to May 1999, Ms. Smith worked as a cashier for Staples. On June 1, 1999, she began work with the present employer as a tray inspector. (Dec. 3.) The job required continuous leaning, bending, lifting and twisting while standing on a concrete floor. Ms.

Smith worked an eight-hour shift, five days a week. She would handle as many as 3,500 one pound trays per day. (Dec. 3-4.)

The judge found that on or about June 14, 1999, the employee felt pain and discomfort in her neck. She continued to work despite the discomfort. On June 28, 1999, while bending to lift a mail tray, the judge found that the employee suddenly felt severe neck and back pain. The employee reported the incident to the employer. She went to the insurer's medical provider and was directed to remain out of work for two weeks. An MRI indicated a right central disc herniation of the employee's cervical spine and a right disc herniation of her lumbosacral spine. In September 1999, Ms. Smith underwent surgery to remove four discs at the C3-4 and C5-6 levels. She has not worked since June 28, 1999. (Dec. 4.)

Pursuant to § 11A, Dr. Eugene W. Leibowitz examined the employee. His report and deposition were admitted into evidence. (Dec. 2.) In his report, the doctor opined that the employee was temporarily totally disabled and not at an end result. (Dec. 5.) He also opined in his report that this disability was causally related to the work incident in June 1999. The § 11A examiner stated that the employee reported to him that the date of injury was June 23, 1999, (Statutory Ex. 1; Dep. 8), rather than June 28, 1999 as testified to by the employee at hearing. (Tr. 22-23; Dec. 4.)

The judge found that the employee sustained an injury to her neck and back on June 28, 1999 while in the scope of her employment. In addition, the judge determined that the September 1999 surgery was necessitated by the work incident. (Dec. 5.) The judge adopted Dr. Leibowitz's medical opinions that the employee's neck, back and arm pain was associated with her cervical discs, that the employee was temporarily totally disabled and that she had not yet reached a medical end result. Accordingly, the judge awarded §§ 13, 30 and 34 benefits, and counsel fees. (Dec. 5-6.)

The insurer argues, and we agree, that the judge's finding of causal relationship is without medical support. In his written report, on the question of causal relationship, the doctor opined:

I believe there is a direct causal relationship between the incident at work

> and the patient's herniated cervical discs which were associated with her neck and arm pain. I believe, by history, the discomfort in her low back and right leg radiation are also associated with the incidents while at work in June of 1999. There was a predisposition for this problem with the spondylolisis, but, by history, there have been no prior episodes of back and right leg pain and, therefore, I believe that the preexisting condition was made symptomatic at the time of the incidents in June of 1999.

(Statutory Ex. 1.) In the testimonial hearing, which preceded the deposition of Dr. Leibowitz, certain medical records were admitted, over objection, into evidence. (Tr. 44; Insurer Ex. 2.) Not all of those records had apparently been provided Dr. Leibowitz prior to his examination of the employee. (Dep. 10.)[1] One of these was a June 15, 1999 report of Dr. Glenn Alli, which reported that on that date the employee complained of one month of worsened radiating lumbar pain and cervical pain. Id.[2] On June 15, 1999, Dr. Alli ordered an MRI, (Insurer Ex. 2), which took place on June 24, 1999. (Dep. 12.) A June 29, 1999 report of Dr. Alli, reviewed by Dr. Leibowitz at his deposition, states that "while bending at work [on June 28, 1999, the employee] had a sudden onset of more severe right lumbar pain." (Dep. 13.) Thereafter, Dr. Leibowitz was asked to assume that the employee wrote that the accident date was June 28, 1999; that she gave a history to a Dr. Abbasy that the onset of her problems was June 28, 1999; and that on June 15, 1999 she complained to Dr. Alli of one month history of radiating lumbar pain and cervical pain. (Dep. 16.) Dr. Leibowitz thereupon answered "No" to the question whether he had an opinion as to the cause of the employee's cervical and lumbar complaints. (Dep. 17.) Finally, there was the following question and answer:

> Q. Would it be fair to say, Doctor, that you cannot causally relate, to a reasonable medical certainty, Ms. Smith's cervical and lumbar complaints and problems to any work-related accident June 23rd?

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[1] Employee's counsel did not attend Dr. Leibowitz's deposition "because of lack of notice." (Dec. 2-3.) Although employee's counsel was given an opportunity to depose the doctor on another date, counsel elected not to do so. (Dec. 3.)

[2] This report was included in records that, without objection, were marked as Exhibit D to the deposition, (Dep. 14); it is also included in Insurer Exhibit 2.

A. Yes.

Id.

Generally, "[t]he opinion of an expert which must be taken as his evidence is his final conclusion at the moment of his testifying." Buck's Case, 342 Mass. 766, 770 (1961), citing Perangelo's Case, 277 Mass. 59, 64 (1931); See Clarici's Case, 340 Mass. 495, 497 (1960). In his report, Dr. Leibowitz causally related the employee's condition to her work. (Statutory Ex. 1.) However, at his deposition, after he received information that he did not have at the time he wrote his report, Dr. Leibowitz came to a different conclusion. Dr. Leibowitz's final conclusion was that he did not have an opinion as to the cause of the employee's cervical and lumbar complaints, and that he could not relate those complaints to any work related accident on June 23. (Dep. 17.)

The present case falls within the line of cases represented by Wilkinson v. City of Peabody, 11 Mass. Workers' Comp. Rep. 263 (1997), and Allie v. Quincy Hosp., 12 Mass. Workers' Comp. Rep. 167 (1998). In Wilkinson, an orthopedic impartial physician was unable to offer an opinion on the cause of the employee's psychiatric condition. Wilkinson, supra at 264. In Allie, the impartial physician was silent as to the causal relationship between the employee's carpal tunnel condition and her work. Allie, supra at 168. In both those cases (and the present case), expert medical testimony on causation was needed, Josi's Case, 324 Mass. 415, 418 (1949); yet, no party moved to present additional medical evidence. Nevertheless, in each case, the judge believed there was merit to the employee's claim, found the requisite causal relationship and awarded the employee compensation. The cases were recommitted:

> [F]aced with a claim he believed to be meritorious and with an inadequate impartial report, the judge should have exercised his authority to sua sponte require additional medical evidence. See § 11A(2). Such approach, in the circumstances of this case, would have provided each party with a fair opportunity "to make out its position on the disputed issue." O'Brien[']s Case, 424 Mass. 16, 22-23 (1996)]. Because the judge instead attempted to plug the hole with his own causation opinion, the decision cannot stand.

Wilkinson, supra at 265. Allie, supra at 170. See also Viveiros's Case, 53 Mass. App. Ct. 296, 299 n.6 (2001).

In the present case, Dr. Leibowitz gave his final testimony on causal relationship during his deposition. He expressed a causal relationship opinion with regard to June 23rd only; i.e., he could not relate the employee's complaints to any work related accident on that date. However, Dr. Leibowitz did not otherwise have an opinion as to the cause of the employee's cervical and lumbar complaints. This is functionally equivalent to the inability of the impartial physician to offer an opinion in Wilkinson and to the failure to offer one in Allie. And as in those cases, neither party moved to present additional medical evidence. Likewise, the judge's attempt here to "plug the evidentiary hole" with his own opinion was error. Instead, he should have sua sponte required additional medical evidence.

Therefore, like Wilkinson and Allie, we reverse the decision and recommit the case for additional medical evidence on the issue of causal relationship.[3]

So ordered.

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[3] In Viveiros's Case, supra, the impartial physician did not express an opinion as to the employee's disability for a period of several months prior to the physician's examination. The administrative judge denied the employee's claim for benefits for that several month period. The Appeals Court affirmed the judge's decision: "At the hearing, Viveiros did not move to present further medical evidence and chose to rely on the report of the [§11A physician]. . . . [I]t was not incumbent upon the administrative judge to order it sua sponte. The administrative judge's finding that Viveiros failed to sustain the burden of proof necessary to support an award of further benefits was adequately supported by the record and was not error." Id. at 300.

The Appeals court in Viveiros's Case, acknowledged the holdings in Wilkinson and Allie:

> These cases stand for the proposition that where the administrative judge is faced with an inadequate IME report and an employee's claim that the judge believes to be meritorious, the judge is empowered to authorize further medical evidence sua sponte, even though no party has requested it, rather than rely on the judge's own lay medical opinion. These cases are distinguishable from the case at hand.

Viveiros's Case, supra at 300 n.6.

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Filed: **May 21, 2002**